SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley Mot. Seq. 019
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E** Hon. Andrea Masley Mot. Seq. 020

MEMORANDUM OF LAW IN OPPOSITION TO INSURERS' MOTION FOR PARTIAL REVIEW OF MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER REGARDING MOTION TO COMPEL PRODUCTION OF REINSURANCE AND RESERVE INFORMATION

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Defendants the National Football League ("NFL") and NFL Properties LLC ("NFL Properties") (together, the "NFL parties") respectfully submit this memorandum of law and the affirmation of Dustin Cho ("Cho Aff.") in opposition to the Insurers' Motion Seeking Partial Review of the February 26, 2019 Memorandum and Order of Special Referee Michael Dolinger Regarding the NFL Parties' Motion to Compel (Reinsurance and Reserves).[1]

PRELIMINARY STATEMENT

The instant motion is one of three filed by the Insurers challenging key aspects of the Special Referee's careful, balanced, and thorough 80-page opinion, which ruled for and against each side after extensive briefing and eight hours of oral argument on the five motions pending before him. The NFL parties have chosen not to challenge those aspects of the opinion that denied the relief they sought whereas the Insurers are seeking to overturn portions of the opinion that correctly rejected their arguments. This and the Insurers' other two motions seeking review should be denied as meritless.

After analyzing a plethora of fact patterns in dozens of discovery order precedents, and after applying those decisions against the complex array of issues that have been asserted in this case, the Special Referee granted in part and denied in part the NFL parties' motion to compel discovery relating to reinsurance and reserves. The Special Referee's decision is not clearly erroneous and should be confirmed.

First, the Special Referee did not err in requiring the Insurers to disclose their communications with their reinsurers regarding the NFL parties' insurance policies and regarding the NFL parties' insurance rights. By definition, those communications all relate to the NFL parties' coverage claims that are at issue in this case. The Insurers' communications

[1] In this memorandum, "Insurers" refers to the movants.

with their reinsurers likely address how the Insurers have handled the NFL parties' claims, the information the Insurers have regarding the risks they insured, and how to interpret and apply their insurance policies to these claims. The Special Referee reasonably concluded, consistent with other courts' discovery decisions regarding reinsurance materials, that disclosure of these communications is reasonably calculated to lead to information relevant to at least two central issues in this case: whether the Insurers have handled the NFL parties' claims in good faith, and whether the Insurers lacked material information regarding the insured risks. In addition, although the Special Referee did not reach the issue, such communications are also discoverable because they are reasonably calculated to lead to information regarding the other claims and defenses in this case, including how the Insurers interpret and apply disputed provisions in their insurance policies to the claims at issue here.

Second, even if the Insurers' reinsurance policies themselves were not sufficiently relevant in this case to be discoverable under CPLR 3101(a), the Special Referee correctly ordered the Insurers to produce their reinsurance agreements under CPLR 3101(f). That provision requires disclosure of "any insurance agreement," which the Insurers concede includes reinsurance agreements. The Insurers' argument that reinsurance agreements are subject to disclosure under CPLR 3101(f) only if they are also "relevant" is inconsistent with the plain language of the statute and its legislative history.

Third, the Special Referee did not err in ordering certain Insurers to produce reserve information relating to the NFL parties' claims. He held that reserve information must be disclosed by the Insurers that are alleged to have refused to consent to the underlying settlement in bad faith. As the Special Referee concluded, courts consistently require insurers to produce reserve information where bad faith refusal to consent to a settlement is at issue.

BACKGROUND

A. Factual Background

The NFL parties purchased from the Insurers more than one hundred general liability insurance policies for policy periods between 1960 and 2012. *See, e.g.*, O'Connor Aff. Ex. B at Cho Aff. Ex. 3 at 26–34 (NFL parties' counterclaims).[2] Those insurance policies cover the NFL parties for liability to third parties for bodily injury claims. *Id.* at 34–35.

In 2011, hundreds of former professional football players filed suits against the NFL parties, claiming that the NFL and its affiliate, NFL Properties, negligently failed to protect players from brain injuries allegedly caused by concussive and sub-concussive head impacts. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015). In 2012, these cases were consolidated as a multidistrict litigation in the U.S. District Court for the Eastern District of Pennsylvania (the "MDL"). *See id.*

In 2013, the MDL court ordered the underlying plaintiffs and the NFL parties to participate in mediation. *Id.* at 363. The NFL parties provided Insurers with numerous confidential briefings regarding the underlying mediation and sought the Insurers' consent to underlying settlement proposals. In response, several of the Insurers (the "Consent-Waiving Insurers") expressly agreed that they would not later seek to avoid coverage on the basis that the NFL parties lacked insurer consent to settle. *See, e.g.*, O'Connor Aff. Ex. B at Cho Aff. Ex. 3 at 38. Certain of the insurers (the "Consent-Refusing Insurers"), however, either did not respond or explicitly refused to consent to the NFL parties entering the proposed settlement. *Id.* at 47–48.

[2] Exhibit B to the Affirmation of Kevin J. O'Connor, dated March 14, 2019 ("O'Connor Aff"), contains the NFL parties' initial motion papers before the Special Referee, including the Affirmation of Dustin Cho and its 26 attached exhibits. *See* Cho Aff. ¶ 2.

In August 2013, the NFL parties and plaintiffs' representatives reached agreement on a term sheet that included $765 million in compensation for the plaintiff class's alleged injuries and to fund medical examinations. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 364. After the detailed terms of the settlement were documented over the next several months, class counsel sought preliminary approval of the settlement from the MDL court. *Id.* In January 2014, the MDL court denied preliminary approval, primarily out of concern that the capped fund would exhaust before the 65-year life of the settlement ran its course. *Id.*

After several more months of negotiations, the NFL parties and underlying plaintiffs' representatives reached a revised agreement that, among other things, retained the cap on individual awards, but eliminated the aggregate cap on all awards. *See id.* The MDL court preliminarily certified the plaintiff class and approved the revised settlement agreement in July 2014. *Id.* at 365. After class-wide notice and further proceedings, the MDL court granted final class certification and approval in April 2015. *Id.* at 424–25. The U.S. Court of Appeals for the Third Circuit affirmed approval of the settlement in April 2016. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016). In December 2016, the U.S. Supreme Court denied petitions for certiorari. *See, e.g.*, *Armstrong v. Nat'l Football League*, 137 S. Ct. 607 (2016). The class settlement took effect on January 7, 2017. O'Connor Aff. Ex. B at Cho Aff. Ex. 3 at 37.

The class settlement did not conclude the underlying litigation. Dozens of retired NFL football players or their family members opted out of the settlement class and continue to litigate against the NFL parties. *See id.* at 38; O'Connor Aff. Ex. B at Cho Aff. Ex. 8; O'Connor Aff. Ex. B at Cho Aff. ¶ 11.

To date, the class settlement administrator has given notice of monetary awards totaling more than $500 million. The Insurers have not paid or reimbursed any of those costs.

B. Relevant Coverage Litigation Procedural History

1. The Parties' Allegations

On February 15, 2017, after the class settlement took effect, the NFL parties filed amended cross-claims and counterclaims in the coverage action against the Insurers. *See* O'Connor Aff. Ex. B at Cho Aff. Ex. 3. First, the NFL parties alleged that certain Insurers breached their insurance contracts by failing to defend fully the NFL parties against the underlying lawsuits, and further sought declaratory judgment regarding these Insurers' defense obligations. *Id.* at 41–43 (Counts I and II). Second, the NFL parties alleged that certain Insurers had breached their contractual duty to indemnify the NFL parties for the class settlement, and further sought declaratory judgment regarding all of the Insurers' indemnification obligations. *Id.* at 43–47 (Counts III and IV). Third, the NFL parties sought a declaration that the Consent-Refusing Insurers had unjustifiably and in bad faith failed or refused to consent (or to waive any defense based on lack of consent) to the class settlement. *Id.* at 47–48 (Count V).[3]

The Insurers denied the NFL parties' claims and asserted dozens of purported defenses to coverage. The Insurers' asserted defenses include the following:

- reasonableness of the settlement — *e.g.*, that the class settlement supposedly was "excessive or unreasonable," O'Connor Aff. Ex. B at Cho Aff. Ex. 5 at 30;

[3] Although Allstate, American Guarantee, and Arrowood initially failed to respond to the NFL parties' requests for consent to the proposed settlement, they agreed in 2017 (a few weeks after the NFL parties' cross-claims were filed) that they would not assert lack of consent as a basis for their seeking to avoid coverage. *See* Cho Aff. Ex. A, Ex. B.

- consent to the settlement — *e.g.*, that "no coverage is available . . . for any settlements . . . made without the [insurers'] consent," *id.*;
- failure to disclose — *e.g.*, that the NFL parties supposedly "failed to disclose . . . facts which were material to the risks" when they purchased the policies, O'Connor Aff. Ex. B at Cho Aff. Ex. 4 at 15;
- lack of information — *e.g.*, that the Insurers lacked "information with respect to the underlying claims," including whether the underlying plaintiffs' alleged injuries could have arisen out of football, O'Connor Aff. Ex. B at Cho Aff. Ex. 5 at 30;
- known loss — *e.g.*, that the "policies do not provide coverage for bodily injury that was known to the NFL and/or NFL Properties prior to the policy periods," and which was not known to the Insurers, O'Connor Aff. Ex. B at Cho Aff. Ex. 6 at 19;
- expected or intended injury — *e.g.*, that coverage is barred because the NFL parties "expected or intended" the long-term neurodegenerative injuries alleged by the former NFL players, *id.*;
- purported athletic participant exclusions — *e.g.*, that various insurance policy provisions supposedly preclude coverage for bodily injury to "athletic or sports participants," O'Connor Aff. Ex. B at Cho Aff. Ex. 6 at 20; and
- allocation across insurance policies — *e.g.*, that coverage depends on issues of how to "appropriately allocate[]" the underlying liability between the NFL and NFL Properties and across the Insurers' policy periods over time,

O'Connor Aff. Ex. B at Cho Aff. Ex. 4 at 18; *see also* O'Connor Aff. Ex. B at Cho Aff. Ex. 6 at 22.

In addition, the Insurers have alleged numerous other defenses purportedly based on language in various additional insurance policy provisions. *See generally, e.g.*, O'Connor Aff. Ex. B at Cho Aff. Ex. 4, Ex. 5, Ex. 6. One Insurer's pleading states that its defenses to coverage in this case include so many different policy provisions that they "cannot all be itemized." O'Connor Aff. Ex. B at Cho Aff. Ex. 6 at 18.

2. The NFL Parties' Discovery Requests

In discovery, the NFL parties requested that the Insurers disclose their documents relating to the NFL parties' insurance policies and the NFL parties' claim for insurance coverage for the underlying litigation—including (i) the Insurers' communications with their reinsurers regarding the NFL parties' policies and claims, (ii) the applicable reinsurance agreements, and (iii) reserve information relating to the NFL parties' claim for insurance coverage at issue in this case. *See, e.g.*, O'Connor Aff. Ex. B at Cho Aff. Ex. 1 at 10, Ex. 2 at 4.

The Insurers asserted a blanket objection and refused to produce any information that related to reinsurance for the NFL parties' claim or the setting of reserves. *See, e.g.*, O'Connor Aff. Ex. B at Cho Aff. Ex. 15 at 1–2. The Insurers asserted that "communications between an insurer and its reinsurer are confidential and not discoverable," that the applicable reinsurance agreements are "irrelevant," and that reserve information "constitutes commercially-sensitive and proprietary work product that is irrelevant." *Id.*

On February 2, 2018, the parties wrote to this Court requesting the Court's assistance to resolve the parties' discovery dispute. *See id.* At a conference on February 6, 2018, the Court directed the parties to consider retaining a discovery referee. *See* Cho Aff. Ex. C at 2. On April 30, 2018, pursuant to the parties' agreement, this Court entered an order appointing Hon.

Michael H. Dolinger (Ret.) as referee pursuant to CPLR 3014 to supervise all disclosure in these actions. *Id.*

On August 21, 2018, the NFL parties filed a motion before the Special Referee to compel the Insurers to produce reinsurance and reserve information relating to the NFL parties' claim. *See* O'Connor Aff. Ex. B.

3. The Special Referee's Memorandum & Order

On February 28, 2019, after briefing and oral argument, the Special Referee issued a written opinion that granted in part and denied in part the NFL parties' motion with respect to reinsurance and reserve information. *See* Cho Aff. Ex. D at 71–77 ("Mem. & Order").

The Special Referee held that the Insurers' correspondence with their reinsurers is "sufficiently likely to contain pertinent information as to justify mandated production." *Id.* at 76. Because the Insurers have refused to disclose any information regarding their communications with reinsurers about the NFL parties' policies and claims, Special Referee Dolinger noted that "[t]he record is quite opaque as to the contents of [these] communications." *Id.* He observed, however, that the First Department and other courts have concluded that reinsurance-related documents are relevant in insurance coverage actions. In particular, the Special Referee concluded that such information is "[p]resumptively . . . discoverable" where an insurer "has asserted 'failure to disclose' defenses or is targeted by [a] bad-faith claim." *Id.* The Special Referee rejected the Insurers' claim of privilege because "they have offered no evidence for that vague assertion." *Id.* at 77. Finally, the Special Referee held if the documents are "confidential," that "is not a basis for non-production," and noted that "sensitive documents can be produced under" the "governing confidentiality order in this case." *Id.*

With respect to the Insurers' applicable reinsurance agreements, the Special Referee held that CPLR 3101(f) requires disclosure, and cited decisions by the Appellate Division of the First

and Fourth Departments supporting his conclusion. *Id.* at 75. Special Referee Dolinger addressed the authority cited by the Insurers in their opposition to the motion. He explained that one of the trial court cases they cited was "problematic" for five distinct reasons, including its failure to address relevant binding precedent, and he noted that another trial court case cited by the Insurers on this issue actually allowed discovery of reinsurance information. *Id.* at 75 n.59.

With respect to reserve information regarding the NFL parties' claims, the Special Referee granted the motion to compel as to the Insurers against which the NFL parties have asserted "claims of bad faith" or which raise "any other claims or defenses pertaining to the reasonableness of the MDL settlement." *Id.* at 73–74. The Special Referee denied the motion as to the Consent-Waiving Insurers. *Id.* Citing numerous cases, Special Referee Dolinger concluded that there is "a pattern of judicial approval for disclosure of reserves when designed to address these types of issues." *Id.* at 72–73. The Special Referee rejected the Insurers' claim of privilege over all reserve-related information because "the carriers make only passing allusion to the vague possibility" of privilege, which is "insufficient to sustain the carriers' burden." *Id.*

On March 14, 2019, the Insurers filed a motion in this Court seeking review of that portion of Special Referee's order requiring the Insurers to produce information relating to reinsurance contracts, communications with reinsurers, and reserves. The NFL parties chose not to appeal the portions of the Special Referee's order that partially denied their motion to compel.

STANDARD OF REVIEW

The Insurers' motion should be denied no matter what standard of review the Court applies to the Special Referee's rulings. Nevertheless, when reviewing a referee's order under CPLR 3104(d), the Court may limit its review to whether the referee's order is "clearly erroneous or contrary to law." *CIT Project Fin. v. Credit Suisse First Boston LLC*, No. 600847/2003, 2005 WL 729528, at *2 (Sup. Ct., N.Y. Cty. Feb. 25, 2005) (rejecting the

argument that a *de novo* standard of review should apply); *see also, e.g.*, *Genger v. Genger*, No. 100697/2008, 2016 WL 3442353, at *1 (Sup. Ct., N.Y. Cty. June 21, 2016) (adopting the "clearly erroneous or contrary to law" standard of review).[4] The Court may affirm the referee's decision on any ground supported by the record. *See, e.g.*, *Emp'rs Ins. of Wausau v. Am. Home Prods. Corp.*, 238 A.D.2d 154, 154–55 (1st Dep't 1997).

A party is entitled to discovery under CPLR 3101(a) so long as its request is "reasonably calculated to lead to the discovery of relevant information" and is not unduly burdensome. *O'Halloran v. Metro. Transp. Auth.*, 169 A.D.3d 556, 557 (1st Dep't 2019); *see also Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018). "[T]he burden of proving that an item should not be produced during discovery is placed upon the party seeking to avoid such discovery." *New York State Elec. & Gas Corp. v. Lexington Ins. Co.*, 160 A.D.2d 261, 262 (1st Dep't 1990).

ARGUMENT

The Special Referee's order should be confirmed. The Special Referee did not err—clearly or otherwise—in concluding that the Insurers' communications with their reinsurers about the NFL parties' claims are reasonably calculated to lead to the discovery of information relevant to several issues in this case. Those issues include whether the Insurers handled the NFL parties' claims in bad faith, the Insurers' allegations that they were kept in the dark because

[4] We respectfully submit that "clearly erroneous or contrary to law" standard is especially appropriate here given (i) the Special Referee's vast experience resolving discovery disputes during his more than 30 years as a United States Magistrate Judge and his work as a JAMS neutral, and (ii) the self-evident care that the Special Referee exercised in considering the voluminous briefing of these issues and the full-day of oral argument, as reflected in his 80-page single-spaced Memorandum & Order.

the NFL parties failed to disclose material information, and the Insurers' interpretation of disputed insurance policy terms. Moreover, as the Special Referee correctly held, the Insurers' applicable reinsurance agreements must be produced not only because they are reasonably calculated to lead to the discovery of relevant information under CPLR 3101(a), but also because CPLR 3101(f) by its terms requires such production.

Information relating to the Insurers' reserves for the NFL parties' claims also must be disclosed. After considering numerous discovery order precedents and the specific allegations at issue in this case, the Special Referee did not err in concluding that such reserve information is potentially relevant to at least two issues: the Insurers' assessment of the reasonable settlement value of the underlying litigation and whether the Consent-Refusing Insurers' refusal to consent to the class action settlement (or waive lack of consent) was in good faith.

I. Reinsurance Information

It is "common sense" that an insurer's communications with its reinsurers about the very policies and claims at issue in a coverage case are reasonably calculated to contain relevant information. *Baxter Int'l, Inc. v. AXA Versicherung*, 320 F.R.D. 158, 162 (N.D. Ill. 2017). Moreover, CPLR 3101(f) requires disclosure of the Insurers' reinsurance agreements.

Reinsurance agreements are insurance for an insurance company. The reinsurer agrees to indemnify the "ced[ing]" insurer for amounts payable by an insurer to its insured relating to the risk that is transferred. *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 30 N.Y.3d 508, 512 (2017). Ceding insurers generally have a duty to communicate to their reinsurers all material facts regarding a potential risk of loss that is indemnifiable under their reinsurance contracts. *See, e.g.*, *Christiania Gen. Ins. Corp. v. Great Am. Ins. Co.*, 979 F.2d 268, 278 (2d Cir. 1992). Insurers therefore frequently share relevant information regarding their interpretation of their policies and their assessments of when those policies will be implicated by claims

asserted against a policyholder. *See, e.g.*, *id.* at 273 (describing correspondence and meetings between insurer and reinsurer regarding a claim, including "detailed information concerning the [policyholder's] account and particular claims").

A. Communications with Reinsurers

The Special Referee correctly concluded that the Insurers' communications with their reinsurers regarding the NFL parties' policies and claims are reasonably calculated to lead to information relating to at least two issues in this case: (1) whether the Consent-Refusing Insurers unjustifiably and in bad faith refused to consent to the class settlement and (2) whether the NFL parties failed to disclose to the Insurers information material to the risk. Although the Special Referee did not reach the question, the request for these communications is also reasonably calculated to lead to relevant information regarding interpretation of disputed policy provisions, which is a third and independent ground for confirming the order.

First, the Insurers' communications with their reinsurers are reasonably calculated to lead to relevant information regarding whether the Consent-Refusing Insurers refused to consent to the class settlement in good faith. Courts have consistently held that an insurer's communications with its reinsurer concerning the handling of particular claims may bear on whether that insurer handled those claims in bad faith. *See, e.g.*, *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, Civ. No. 06-4262, 2009 WL 1247122, at *4 (E.D. La. May 5, 2009) (collecting cases); *Nat'l Union Fire Ins. Co. v. Donaldson Co.*, No. 10-4948, 2014 WL 2865900, at *4 (D. Minn. June 24, 2014).

Notably, the Consent-Refusing Insurers did not dispute this point in their brief before the Special Referee, even as the Consent-Waiving Insurers emphasized it as a reason why such discovery should not be ordered as to them. *See* O'Connor Aff. Ex. C at 39 (arguing that because "the NFL Parties do not allege bad faith against the Umbrella/Excess Insurers, ...

reinsurance materials . . . have no bearing . . . on the dispute between the NFL Parties and the Umbrella/Excess Insurers"). Nor did the Consent-Refusing Insurers dispute it at oral argument, *see* Cho Aff. Ex. E at 383–87, even after the NFL parties' reply brief specifically noted that "[t]he Insurers do not dispute that reinsurance materials are relevant to the issue of the Consent-Refusing Insurers' bad faith," O'Connor Aff. Ex. D at 17. The Insurers thus waived and failed to preserve for the Court's review their new argument that their communications with reinsurers cannot be relevant to whether they withheld their consent to the class settlement in bad faith. *See Hexcel Corp. v. Hercules Inc.*, 291 A.D.2d 222, 223 (1st Dep't 2002).

Aside from the fact that they have waived the argument, their position is meritless. The Insurers do not cite any case denying a policyholder discovery of an insurer's communications with its reinsurers where the insurer was alleged to have refused to consent to a settlement in bad faith. The Insurers argue that *Imperial Trading* permitted discovery of reinsurance information only where the insurer's "claims handling" of the policyholder's claim was in bad faith, and argue that the NFL parties "have *not* alleged any claims against the Insurers for failure to handle the NFL Parties' claims in good faith." Insurer Mem. at 6. That is incorrect. The NFL parties have alleged that the Consent-Refusing Insurers *did* handle the NFL parties' claim in bad faith—by refusing to consent to the class settlement unjustifiably and in bad faith. *See* O'Connor Aff. Ex. B at Cho Aff. Ex. 3 at 47–48.

Moreover, *Imperial Trading*'s holding was not so limited. The *Imperial Trading* court wrote broadly that "in every case brought to this Court's attention that specifically considered the relevance of reinsurance-related communications to the issue of bad faith, the courts found that such communications are discoverable." 2009 WL 1247122, at *4. And it cited, among other authority, a decision that ordered discovery of a consent-refusing insurer's communications with

its reinsurers because the "Insurers may well have discussed their positions on the [policyholder's] proposed settlements, or their positions in general in the underlying securities litigation, with some or all of their reinsurers." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Cont'l Ill. Corp.*, 116 F.R.D. 78, 83 (N.D. Ill. 1987). Accordingly, after evaluating the cases cited by both sides and the allegations in this case, the Special Referee did not err in ordering the Consent-Refusing Insurers to produce their communications with reinsurers regarding the NFL parties' policies and claims.

Second, it is well-established that an insurer's communications with its reinsurers are relevant to the Insurers' "failure to disclose" defense. *See, e.g.*, *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y.*, 284 F.R.D. 132, 138 (S.D.N.Y. 2012); *Rhone-Poulenc Rorer, Inc.* v. *Home Indem. Co.*, No. 88-9752, 1991 WL 237636, at *3 (E.D. Pa. Nov. 7, 1991) ("[R]einsurance appears to be always discoverable for purposes of rebutting a defense, particularly of misrepresentation (as well as non-disclosure) . . . ."). This is because an insurer is itself obligated to disclose all material information to its reinsurer. *See Christiana*, 979 F.2d at 278 ("The relationship between a reinsurer and a reinsured is one of utmost good faith, requiring the reinsured to disclose to the reinsurer all facts that materially affect the risk of which it is aware and of which the reinsurer itself has no reason to be aware."). The insurer's communications with its reinsurer are thus reasonably calculated to discover the insurer's knowledge of the risk, and the insurer's knowledge of the risk defeats the "failure to disclose" defense. *See, e.g.*, 6 Couch on Ins. § 84:7 ("It is well-settled that the insured is under no duty to disclose to the insurer what the insurer already knows or ought to know.").

The Insurers do not cite any case to the contrary. Instead, they argue that the Southern District of New York's 2012 decision in *Fireman's Fund* was decided on the "narrow grounds"

that the alleged failure to disclose in that case "involved an insurer's knowledge of a single dock." Insurer Mem. at 7. But this artificial and strained interpretation of *Fireman's Fund* finds no support in the language of the decision. In fact, the *Fireman's Fund* court stated that it was "persuade[d]" by "[t]he court's rationale in *Stonewall* [*Ins. Co. v. Nat'l Gypsum Co.*, No. 86 Civ. 9671, 1988 WL 96159, at *5 (S.D.N.Y. Sept. 6, 1988)]." *Fireman's Fund*, 284 F.R.D. at 138. The *Fireman's Fund* court explained that "[i]n that case [(*i.e.*, *Stonewall*)], . . . a company that manufactured asbestos-containing products" was granted discovery of reinsurance documents from its insurer because "reinsurance documents could 'reflect an insurer's understanding of the risk it underwrote and thereby rebut the defense, raised by several insurers, that [the policyholder] failed to disclose information sufficient to apprise the insurer of that risk.'" *Id.* (quoting *Stonewall*, 1988 WL 96159, at *5). That same principle applies to the Insurers' asserted "failure to disclose" defense in this case, and the Special Referee's conclusion on that point is not clearly erroneous.

Third, although the Special Referee did not reach the question, courts have ordered the disclosure of reinsurance materials in coverage litigation where, as here, there are disputes regarding the interpretation and application of insurance policy language. *See, e.g.*, *Ins. Co. of N. Am. v. UNR Indus., Inc.*, No. 92 Civ. 4236, 1994 WL 683423, at *1 (S.D.N.Y. Dec. 6, 1994) (ordering insurer to produce "communications with reinsurers"); *Machinery Movers, Riggers & Machinery Erectors, Local 136 Defined Contribution Pension Plan v. Fid. & Deposit Co. of Md.*, No. 06 C 2539, 2007 WL 3120029, at *3 (N.D. Ill. Oct. 19, 2007) ("[Insurers'] communications with reinsurers regarding the policy could be probative evidence of [insurers'] subsequent conduct that could be used to give meaning to the disputed terms.").

Reinsurance materials relating to the NFL parties' claims in this case, or to the issuance of the applicable reinsurance in the first place, are reasonably calculated to lead to discovery of the Insurers' candid interpretations of the relevant policy language and information relating to the merits of the Insurers' coverage defenses. For example, one of the Insurers has produced a document indicating that [redacted] Communications between the Insurer and its reinsurer regarding that distinction would be highly relevant to the scope of coverage under the Insurer's policy for the NFL parties' claims, and to the insurers' and reinsurers' acceptance of the risks of insuring the NFL parties. Reinsurance information is particularly relevant here, given the numerous and "novel" coverage issues that the Insurers have asserted to avoid coverage in this case.

Raising a new argument in their motion for review that they never asserted before the Special Referee, the Insurers claim that the confidentiality order that the parties agreed upon and entered in this case is "insufficient" because "it will not protect confidential information of the Insurers from disclosure to each other." Insurer Mem. at 7. But they fail to provide any specifics, much less evidentiary support, for that unsubstantiated assertion. Nor do the Insurers cite any case that denied discovery of communications with reinsurers on that basis. In any event, this is a non-issue because the NFL parties hereby represent that they will consent to any request by an Insurer producing such materials for a protective order to permit them to designate them as "attorneys' eyes only information."

The Special Referee also did not clearly err in rejecting the Insurers' vague claim of privilege over reinsurance materials as unsupported. The Insurers offer nothing different in this appeal. Without providing any specifics or legal authority, the Insurers simply assert that these reinsurance materials are "*potentially* protected by the work product doctrine, the common interest doctrine and the attorney-client privilege." Insurer Mem. at 7 (emphasis added). That does not come close to supporting a claim of privilege. Handling a claim and communicating with reinsurers are ordinary business activities for an insurance company. *See, e.g.*, *Christiania*, 979 F.2d at 273. Accordingly, such communications are not privileged or protected from discovery. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. TransCanada Energy USA, Inc.*, 119 A.D.3d 492, 493 (1st Dep't 2014). The Special Referee correctly concluded that the Insurers failed to carry their burden of establishing privilege over these materials. His order requiring the Insurers to produce their communications with reinsurers should be confirmed.

B. Reinsurance Agreements

The Special Referee correctly concluded that the Insurers' applicable reinsurance agreements are also discoverable under CPLR 3101(f), which permits "discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." CPLR 3101(f). Because reinsurance is a form of insurance and any judgment against the insurers in this case may be satisfied at least in part by reinsurance, the statute applies and requires production of any potentially applicable reinsurance agreements.

The Insurers do not dispute that the plain language of CPLR 3101(f) covers reinsurance agreements. And they do not dispute that both the First Department and the Fourth Department have required production of reinsurance agreements pursuant to CPLR 3101(f). *See Clarendon*

Nat. Ins. Co. v. Atl. Risk Mgmt., Inc., 59 A.D.3d 284, 286 (1st Dep't 2009); *Anderson v. House of Good Samaritan Hosp.*, 1 A.D.3d 970, 971 (4th Dep't 2003). Instead, the Insurers attempt to distinguish those two decisions on facts set forth in various briefs and argue that the reference to "any insurance agreement" in CPLR 3101(f) should be construed to refer only to insurance agreements that are "relevant to the issues at hand." Insurer Mem. at 5. Nothing in the reasoning of *Clarendon* or *Anderson* supports any such limitation. Both decisions applied the statute as written, without reading into it relevancy or any other non-existent limitation. *See Clarendon*, 59 A.D.3d at 286; *Anderson*, 1 A.D.3d at 971. Indeed, the Insurers do not even attempt to argue that the reinsurance policy was relevant to any of the issues in *Anderson*. *See* Insurer Mem. at 3.

CPLR 3101(f) requires disclosure of "any" insurance agreement under which an insurance business may be liable to indemnify or reimburse for payments made to satisfy a judgment in the action. "The language of [CPLR 3101(f)] is unambiguous," and courts are not free to impose a relevance requirement that the statute does not provide; that would be "exactly the kind of judicial legislating which has been expressly prohibited by statute and by the Court of Appeals." *Weiner v. Lenox Hill Hosp.*, 164 Misc. 2d 759, 761 (Sup Ct., N.Y. Cty. 1995), *aff'd*, 224 A.D.2d 299 (1st Dep't 1996). Moreover, a separate subsection of the statute, CPLR 3101(a), already provides for discovery of "all" relevant materials. The Insurers' construction of subsection (f) would therefore render subsection (f)—and its lack of such a requirement—superfluous. Such an interpretation must be avoided. *See, e.g.*, *Kimmel v. State*, 29 N.Y.3d 386, 393 (2017).

The legislative history clearly demonstrates that insurance agreements must be disclosed under CPLR 3101(f) regardless of their relevance to the action. Before CPLR 3101(f) was

enacted in 1975, New York courts generally did not require production of insurance agreements because "such disclosure generally was not material or necessary to the prosecution or defense of an action and, thus, not discoverable under CPLR 3101(a)." *Pandori v. Fortune*, 95 Misc. 2d 208, 210 (Sup. Ct., Schenectady Cty. 1978). "With the enactment of CPLR 3101(f), the Legislature made insurance coverage discoverable without reference to the limitations of CPLR 3101(a)." *Id.* Subsection (f) was "modeled on a federal discovery provision that has since been made the subject of mandatory disclosure under Fed. R. Civ. P. 26(a)(1)(A)(iv)." Siegel, N.Y. Prac. § 637 n.1; *cf.* Fed. R. Civ. P. 26(a)(1)(A)(iv) (requiring production of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment"). The federal rule, which uses the same language as CPLR 3101(f), has been held to apply to reinsurance agreements, and "is absolute . . . and does not require any showing of relevance." *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, 244 F.R.D. 638, 641 (D. Kan. 2007); *see also, e.g.*, *Suffolk Fed. Credit Union v. Cumis Ins. Soc., Inc.*, 270 F.R.D. 141, 142 (E.D.N.Y. 2010).

Against this weight of authorities, the Insurers rely on only one case: *Mt. McKinley Ins. Co. v. Corning Inc.*, No. 602454/2002, 2010 WL 6334283, at *11 (Sup. Ct., N.Y. Cty. Feb. 25, 2010). But as Special Referee Dolinger observed, the *Mt. McKinley* decision never explained why it did not apply CPLR 3101(f). Mem. & Order at 75 n.59. The Insurers argue that *Mt. McKinley* "did explain its rejection of the statute on the grounds that CPLR 3101(f) . . . does not apply . . . where [the policies] are not actually relevant to the issues at hand." Insurer Mem. at 5. But the problem is that *Mt. McKinley* simply *assumes* that an insurance policy must be relevant in order to be discoverable under CPLR 3101(f), without ever explaining why relevance should

be required. *See Mt. McKinley*, 2010 WL 6334283, at *12. As the plain language and legislative history of the statute demonstrate, relevance is not required. The Special Referee's order requiring the Insurers to produce their reinsurance agreements should be confirmed.

II. Reserve Information

The Special Referee concluded that information relating to the reserves set by the Insurers for the NFL parties' claims must be produced because such information is potentially relevant to (i) whether the Consent-Refusing Insurers unjustifiably and in bad faith refused to consent to the class settlement and (ii) the Consent-Refusing Insurers' views on reasonable settlement amounts. *See* Mem. & Order at 72–74. However, the Special Referee held that reserve information is not sufficiently likely to be relevant to the other issues in this case, and denied the NFL parties' motion with respect to the Consent-Waiving Insurers. *See id.* This reasoned and sensible conclusion, which the Special Referee reached after a detailed analysis of more than a dozen precedents, is not clearly erroneous.

In the ordinary course of their business as part of a regulated industry, insurers maintain reserves for the payment or settlement of claims for which they "may be liable." N.Y. Ins. Law § 1303. Reserves are set with respect to the potential underlying liability; an insurer must set reserves if it may be liable for a claim whether or not the insurer disputes coverage. As such, the Insurers' reserves are directly relevant as evidence of their understanding of the reasonable settlement value of the underlying class claims against the NFL parties, and whether the Consent-Refusing Insurers withheld consent to the class settlement in bad faith. For example, if the reserves set by the Insurers (or their internal analyses) were predicated on an assumption that a class-wide settlement would approach in amount the actual class settlement, that would be strong evidence that the settlement amount was reasonable (and that the Insurers withheld their consent in bad faith). *See, e.g.*, *Kirchoff v. Am. Cas. Co., of Reading, Pa.*, 997 F.2d 401, 405 (8th

Cir. 1993) ("Clearly, if [the insurer's claims handler] valued [the insured's] claim at $300,000 . . . but offered only $8000 to settle [the insured's] claim, evidence of that valuation was relevant to the issue of whether [the insurer's] settlement offers were made in good faith.").

In their motion for review, the Insurers largely reiterate arguments from their briefs before the Special Referee that are irrelevant in light of the Special Referee's order. They cite several cases in support of their argument that reserve information is not relevant to show an insurer's "interpretation of policy language" and "is not a discoverable admission of [an] insurer's liability." Insurer Mem. at 9. But the Special Referee did not hold that reserve information is relevant to those issues. To the contrary, he denied discovery of reserve information except with respect to insurers that refused to consent to the class settlement. *See* Mem. & Order at 72–74. These cases cited by the Insurers support the Special Referee's decision.

The Insurers concede that "[t]he legal underpinning for Special Referee Dolinger's decision is a series of cases" which required "production of reserve information in situations where an insurer failed to settle a claim . . . or refused to fund or pay a settlement . . . and the insured later alleged that refusal was made in bad faith." Insurer Mem. at 10. The Insurers attempt to distinguish all of these cases on the basis that they involved "a settlement demand or a settlement opportunity made or presented to an insurer in a fixed amount." *Id.* at 11. But that purported distinction is no different from this case: the Consent-Refusing Insurers here were presented with a series of fixed and certain forms of class settlement, and they refused to consent. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 364. Although these forms included versions with an overall aggregate cap and without one, all

versions included fixed amounts to be awarded to each player based on age, injury, and other factors.

In any event, the Insurers offer no support for the proposition that their reserve information could lead to relevant evidence only if there is a "settlement demand or settlement opportunity made or presented to an insurer in a fixed amount." Insurer Mem. at 11. To the contrary, New York courts have ordered the production of "material concerning the reserve established by the insurer and [related] correspondence" because "these items could be material and necessary to the action as an admission against interest as to defendant's knowledge and evaluation of the case" and because "[n]egligent investigation and uninformed evaluation of the worth of the [underlying] claims [against the insured] . . . can be indicative of bad faith." *Groben v. Travelers Indem. Co.*, 49 Misc. 2d 14, 17 (Sup. Ct., Oneida Cty. 1965), *aff'd* 28 A.D.2d 650 (4th Dep't 1967); *see also Fireman's Fund Ins. Co. v. Great Am. Ins. Co.*, 284 F.R.D. 132, 138–39 (S.D.N.Y. 2012) ("[R]eserves show 'what [the insurer] actually knew and thought, and what motives animated its conduct.'").

The Insurers further argue that each Insurer's reserve is an estimate that reflects only its own "share" of the overall settlement amount, and that such information is therefore "meaningless." Insurer Mem. at 12. That is incorrect. As the Insurers recognize, the Insurer's estimate of its share of the overall settlement amount may reflect *both* its view of the overall settlement amount *and* its view of the share of that total for which it is potentially responsible—*both* of which are highly relevant, and at minimum, "reasonably calculated to lead to the discovery of relevant information." *O'Halloran*, 169 A.D.3d at 557. For example, the NFL parties could use the reserve information to inquire at a deposition how the Insurers arrived at those reserves and the basis for their estimated settlement values. Such information would be

directly relevant to whether the Insurers' refusal to consent to the settlement was in good faith. Moreover, in setting reserves, it is almost certain that there would be internal memoranda discussing the appropriate reserve and why, in light of the underlying claim and coverage situation, a particular reserve should be set.

In a few conclusory sentences at the end of their brief, the Insurers raise a new argument that the only reserve information they should be required to produce is "reserve information existing at the time certain Insurers declined to waive the defense of lack of consent for the MDL settlement." Insurer Mem. at 13. Their vague proposal is so unclear that they suggest in a footnote that the date cutoff "[g]enerally" might be "in 2014 and early 2015," depending on the Insurer. *Id.* at 13 n.12. In fact, the settlement negotiations began in 2013 and the class settlement became effective in 2017. And of course, to this day, all of the Consent-Refusing Insurers are still free to choose to waive the defense of lack of consent, to acknowledge their obligation to indemnify the NFL parties, and to pay the NFL parties' claims. Indeed, the NFL parties initially brought bad faith claims against Allstate, American Guarantee, and Arrowood for failing to respond to the NFL parties' requests for consent—but those three insurers then agreed to waive lack of consent *in 2017*, shortly after the NFL parties brought the claims, and the NFL parties discontinued those claims against those insurers. *See supra* note 3. Nothing is stopping the Consent-Refusing Insurers from doing the same today. Moreover, the Insurers' reserves may have changed before and during settlement negotiations and after the class settlement was reached and approved, based on each settlement demand that the NFL parties received and other information. The Insurers' reserve information regarding these changes is reasonably calculated to lead to information about the Insurers' views on reasonable settlement values, which the Special Referee found to be relevant for discovery purposes. *See* Mem. & Order at 72–73

("whether the MDL settlement was reasonable"); *id.* at 73 ("any other claims or defenses pertaining to the reasonableness of the MDL settlement").

This Court should confirm the Special Referee's order requiring disclosure of reserve information by the Insurers against which the NFL parties have asserted "claims of bad faith" or which raise "defenses pertaining to the reasonableness of the MDL settlement." *Id.* at 73–74.

CONCLUSION

For the foregoing reasons, the Court should confirm the Special Referee's order.

Respectfully submitted,

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